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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 297

HERBERT C. DEESEN,
Petitioner,

vs.

THE PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA, an unincorporated association, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Statutes involved	2
Questions presented	3
Statement of the case	4
Summary of argument	7
Argument	9
I	
PGA's rules and regulations concerning eligibility to participate in PGA sponsored tournaments are discriminatory and unreasonable restraints in violation of Sherman Act, Section One	9
II	
PGA's conduct in arbitrarily excluding competitors from participation in its tournaments violates Sherman Act, Sections One and Two	12
III	
Respondents' asserted defenses do not justify the restraints imposed	16
(1) The fact that membership in PGA is open to all persons is no justification for excluding non-members from playing in professional golf tournaments	16
(2) The fact that the purpose of the rules was to eliminate an evil is not a sufficient justification	17
(3) The fact that PGA may have promoted professional golf tournaments is no justification for permitting it to exclude non-members from participation therein	19
Conclusion	19

Table of Authorities Cited

Cases	Pages
American Federation of Tobacco Growers v. Neal, C.A. 4, 1950, 183 F.2d 869	13, 15
Anderson v. U. S., 171 U.S. 604	10, 12
Associated Press v. U. S., 326 U.S. 1	11, 13, 14
Chicago Board of Trade v. United States, 246 U.S. 231	9
Gamco, Inc. v. Providence Fruit & Produce Building, C.A. 1, 1952, 194 F.2d 484	13, 14
Greenleaf v. Brunswick-Balke-Collender Co., E.D. Pa. 1947, 79 F.Supp. 362	13
Klor's v. Broadway-Hale Stores, 359 U.S. 207	11
U. S. v. Terminal Railroad Association of St. Louis, 224 U.S. 383	11, 13
U. S. v. United States Trotting Association, S.D. Ohio, 1960 Trade Cases, §69,761	10, 13
Washington State Bowling Proprietors Association Inc. v. Pacific Lanes Inc., C.A. 9, 1966, 356 F.2d 371	11, 13, 18

Statutes	
15 U.S.C. §1 and §2 (Sherman Act)	2, 4, 7
15 U.S.C. §4 and §16 (Clayton Act)	3
28 U.S.C. §2101(c)	2

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 3, 1966 and printed in Appendix "B" attached hereto.

OPINIONS BELOW

The opinion of the District Court is unreported and is printed in Appendix "C" attached hereto.

The opinion of the Court of Appeals affirming the decision of the District Court is reported at 358 F.2d 165 and is printed in Appendix "A" attached hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on February 23, 1966. A timely petition for rehearing was denied on April 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101 (c).

STATUTES INVOLVED

15 U.S.C. §1 and §2 (the Sherman Act). Pertinent provisions of this Act are as follows:

Section 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal."

Section 2

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . ."

15 U.S.C. §4 and §16 (the Clayton Act). Pertinent provisions of this Act are as follows:

Section 4

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16

"Any person . . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

QUESTIONS PRESENTED

1. Are the rules and regulations of a nationwide association of professional golf teachers and sellers of golf equipment, controlling 95% of all major professional golf tournaments and access to the business of tournament golf professionals, reasonable under Section 1 of the Sherman Act where they discriminate between members and non-members?

2. Is it reasonable under Section 1 of the Sherman Act to require a tournament golf professional to become a member of an association of golf teachers and sellers of golf equipment by teaching golf at a country

club for five years as a condition to his engaging in the business of tournament golf professionals?

3. Did respondents' conduct in excluding petitioner from further participation in PGA tournaments following termination of his Tournament Player's Agreement constitute a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act?

STATEMENT OF THE CASE

Respondents are individual members and officers of a not-for-profit unincorporated association of some 4,300 professional teachers of golf and sellers of golf equipment at country golf clubs located throughout the United States called the "Professional Golfers Association of America" (sometimes referred to as "PGA"). The association was founded in 1916 to advance the interest of its members and to promote the game of golf. In the early 1930's PGA promoted a tournament program for its members which later developed into a tour of between 40 to 50 tournaments at various golf courses throughout the United States in which its members and others competed for money prizes awarded to those with the lowest scores. The purpose of these tournaments was to promote the public interest in golf and to increase the proficiency of its members and other participants in the business of tournament golf professionals. Following World War II and continuing to the present date PGA has sponsored or co-sponsored over 95%

of such professional golf tournaments in the United States.[1]

Approximately 230 tournament golf professionals follow the PGA tour and regularly enter its tournaments. Of these 70 are members of PGA and the remaining 160 are players permitted by PGA to play in these tournaments called "Approved Tournament Players". The number of players participating in any one tournament is restricted to 150 because of physical limitations of an 18 hole course, under tournament conditions, during the daylight hours of a single day.

Rules and regulations adopted by PGA and in effect during this period are set forth in its "Official Tournament Regulations." They provide in pertinent part, that in order to compete in PGA sponsored tournaments a player must either be a member of PGA or an Approved Tournament Player;[2] to be a member of PGA a player has to be a professional or assistant professional teaching golf at a country club for five years or a tournament player playing 25 tournaments a year for five years; and to be a tournament player a player must either be a PGA member or an Approved Tournament Player approved by PGA's local, sectional and national committees. Such determination is made in the sole discretion of these committees based in part on a player's demonstrated ability to play as good golf as a tournament player

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[1]PGA does not sponsor or co-sponsor the US Open Championship, the Western Open Championship, the Masters Tournament and two or three other major tournaments. Reference herein to "sponsored" includes "co-sponsored".

[2]or one of a limited number of participants invited by local sponsors.

on tour. There are no exact or definite standards set up to determine ability to play. The nature of golf is such that no precise standard of ability can be established other than by comparison of scores and ability to finish in the money in tournaments. In order to enter PGA sponsored tournaments PGA members are not required to meet the standards set for PGA Approved Tournament Players.

Petitioner Deesen is a professional tournament golf player. He is not and never has been, by his own choice, a teacher of golf and seller of golf equipment nor a member of PGA. From 1952-1958, however, he was permitted to participate in PGA sponsored tournaments as an Approved Tournament Player under contract with PGA. During this period he participated in some 41 PGA tournaments, qualified in 12 and placed in the money in 3, earning a total of $240.35. Some of his scores were better than some of the PGA members' scores playing in the same tournaments. There is no question herein that Deesen is an above average golfer. Nor is there any question that he has financial responsibility, character and integrity.

In 1958 petitioner suffered some minor injuries which handicapped his performance temporarily that year as a professional tournament golfer. At about this time PGA determined that because of the popularity of its tournaments it was necessary to limit the number of participants. Accordingly on or about September 1, 1958 it terminated the playing privileges of 57 non-member professional tournament golfers, including those of petitioner. No steps were taken by

PGA at this time or thereafter to limit in any way the right of its own members to participate in its tournaments. From September, 1958 until institution of this action in April, 1959, and thereafter petitioner Deesen applied on numerous occasions for reinstatement of his status as an Approved Tournament Player, but his applications were denied, and he has been prevented to the present date from participating in PGA's sponsored tournaments.

The District Court decided that PGA's rules governing its tournaments were reasonable and therefore did not violate Sherman Act §1 and §2 on the following grounds: (1) PGA rules were not discriminatory, since membership in PGA was open to all persons including Deesen on an equal basis; and (2) since PGA members had made tournament golf possible their unique position in relation to the game warranted consideration not given to non-members. (Appendix "A".)

The Court of Appeals affirmed the judgment of the District Court (Appendix "C").

SUMMARY OF ARGUMENT

Respondents, PGA and its members, contend they are a relatively small group of professional golfers banded together as a voluntary unincorporated association for the promotion of their own interest, and as such their members are entitled to all benefits of such an association including participation in PGA's sponsored tournaments without being required to meet

the same qualifications or playing ability as are required of non-members. The District Court below in effect treated PGA as a small private club which was entirely free to set up whatever rules and regulations it wished in connection with its professional golf tournaments.

Both the District Court and the Court of Appeals concluded that there was in effect no discrimination as between members and non-members *as long as membership in PGA was open to all on an equal basis.*

Petitioner Deesen asserts that the business of *tournament golf professionals* is separate and distinct from that of *teaching golf professionals,* and one which has become nationwide and substantial in recent years and extremely lucrative both to PGA and to the individual players; and while PGA might be responsible to some extent for making possible the business of tournament golf professionals such as by sponsoring the tournaments, providing uniform playing regulations and in other ways, nevertheless if it is a separate and distinct business PGA has no right to monopolize this business for its own members or to boycott and prevent non-members from having access to it by reason of the federal antitrust laws.

He further asserts that it is not reasonable to require a tournament golf professional, as a condition to his engaging in the business of tournament golf professionals, to become a member of an association of golf teachers and sellers of golf equipment by teaching golf and selling golf equipment at a country club for five years.

ARGUMENT

I

PGA'S RULES AND REGULATIONS CONCERNING ELIGIBILITY TO PARTICIPATE IN PGA SPONSORED TOURNAMENTS ARE DISCRIMINATORY AND UNREASONABLE RESTRAINTS IN VIOLATION OF SHERMAN ACT, SECTION ONE.

PGA rules and regulations concerning eligibility for participation in PGA sponsored tournaments and particularly those concerning a player's ability to play golf apply only to non-members and not to members. PGA member may play in any PGA sponsored tournament no matter what his average score (he could be a real duffer), or his ability to finance himself, or the number of tournaments entered, or his ability to compete in the money regularly. Membership in PGA alone is enough. The only purpose for this discriminatory treatment would appear to be to exclude non-members from participating in PGA sponsored tournaments, and to this extent they clearly do not promote competition but stifle it. Accordingly they are unreasonable on their face.

In *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, this Court has stated:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."

In this case a rule prohibiting dealings by members of a Board of Trade from the close of business one day to the opening of business the next day was held not unreasonable since it merely regulated and

thereby promoted competition. It is significant that the rule applied to *all* members uniformly and that access to membership was open to *all* on a non-discriminatory basis. In an earlier case, *Anderson v. U.S.*, 171 U.S. 604 this court also upheld an agreement among members of a Traders' Livestock Exchange not to transact business with non-members where there was nothing to prevent all yard traders from being members of the exchange.

Similarly the rules and regulations of a Trotting Horse Association were recently upheld by the District Court for the Southern District of Ohio where membership in the association was open to *all* persons by payment of a small fee, and *all* members were required to become qualified on an equal basis before being permitted to participate in harness races.

U. S. v. United States Trotting Association,
S.D. Ohio, 1960 Trade Cases, §69,761.

Compare U.S. Trotting Association's non-discriminatory rules on eligibility to participate in its trotting races at page 76,963 of 1960 Trade Cases:

> "USTA Rule 17, Sec. 1, provides that no person shall drive a horse in any race against time on a member track without being an active member and holding a driver's license. No fee is charged for a driver's license. The cost of membership is $10 a year."

with those of PGA which require that non-members qualify, but not members, or failing qualification that they spend five years teaching golf and selling golf equipment at a country club.

Conversely where the restraint imposed does more than merely regulate but suppresses or destroys competition it has been held to violate Sherman Act, Section One. Thus, this Court has struck down provisions in rules and regulations of associations excluding competitors, which were not open to all and where members were given the power to exclude non-members.

U. S. v. Terminal Railroad Association of St. Louis, 224 U.S. 383;
Associated Press v. U. S., 326 U.S. 1.

Recently the Ninth Circuit, from which this appeal is being taken, reached a contrary result on similar facts in *Washington State Bowling Proprietors Association Inc. v. Pacific Lanes Inc.,* C.A. 9, 1966, 356 F.2d 371. There, an association of bowling proprietors adopted certain "eligibility rules" for participation in bowling tournaments which it sponsored. These rules excluded from participation in its tournaments any bowler who bowled in non-member establishments. The court held that this constituted a group boycott and *per se* violation of the Sherman Act under *Klor's v. Broadway-Hale Stores,* 359 U.S. 207 and cases cited therein. In principle there would appear to be no difference between the exclusion of non-members by the bowling proprietors and the exclusion of non-members by PGA.

Petitioner Deesen respectfully submits that PGA's Rules and Regulations do more than merely regulate and thereby promote competition; they arbitrarily exclude many tournament golf professionals from

competing in this business, and thereby tend to suppress and destroy competition.

II

PGA'S CONDUCT IN ARBITRARILY EXCLUDING COMPETITORS FROM PARTICIPATION IN ITS TOURNAMENTS VIOLATES SHERMAN ACT, SECTIONS ONE AND TWO:

Tournament golf professionals are independent business men. PGA is not itself engaged in the business of tournament golf professionals. It has no salaried employees who play on the tour as its representative, nor does it share in the winnings of tournament golf professionals. It does, however, control the access of tournament golf professionals to participate in its tournaments. It holds the key to the door of a substantial market, i.e. the business of tournament golf professionals.[3]

It is well established that given a monopoly position over a market, no one may be arbitrarily excluded therefrom, and the rules for admission to or participation in that market must be on an equal and nondiscriminatory basis for all applicants.

Anderson v. U. S., 171 U.S. 604

Rules legal since membership open to all.

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[3]Although there is no specific finding, the record discloses that this market is substantial. Sources of income of tournament golf professionals include winnings from tournaments, personal appearances on television, radio and moving pictures and endorsements of golfing equipment and other merchandise. In 1960 it is estimated that the top 54 tournament golf professionals earned over $710,000 from winnings alone. (Reporter's Transcript, Trial Proceedings, pp. 130, 197.)

U. S. v. Terminal Railroad Assn. of St. Louis, 224 U.S. 383, *supra*

Rules illegal since membership not open to all and member railroads could exclude non-member railroads from use of terminal facilities.

Associated Press v. U. S., 326 U.S. 1, *supra*

Rules illegal since membership not open to all and members given power to exclude non-members.

Gamco, Inc. v. Providence Fruit & Produce Building, C.A. 1, 1952, 194 F.2d 484

Exclusion of outsiders held illegal.

American Federation of Tobacco Growers v. Neal, C.A. 4, 1950, 183 F.2d 869

Exclusion of outsiders held illegal.

Greenleaf v. Brunswick-Balke-Collender Co., E.D. Pa. 1947, 79 F.Supp. 362

Billiard tournament player excluded from tournament because he used equipment manufactured by competing manufacturer held illegal.

U. S. v. U. S. Trotting Association, S.D. Ohio, 1960 Trade Cases, § 69,761, *supra*

Rules legal since membership open to all, and participation in harness races on non-discriminatory basis.

Washington State Bowling Proprietors Association v. Pacific Lanes, Inc., C.A. 9, 1966, 356 F.2d 371, *supra*

Rules illegal since eligibility to participate in bowling tournaments not open to all.

In *Associated Press v. U.S., supra,* this court struck down the by-laws of an association of newspaper publishers which prevented publisher members from selling association news to non-member competitors, stating in its opinion in part at page 15 of 326 U.S.:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

In *Gamco, supra,* a group of produce wholesalers controlled a building near the railroad terminal where most of the local produce dealings took place. The group had excluded the plaintiff, a competing produce dealer, merely on the ground of his asserted financial unsoundness. The District Court had found no violation of the antitrust laws in the ouster of the plaintiff from the building. The Appellate Court reversed, stating at pages 487-8 of 194 F.2d:

> "Admittedly the finite limitations of the building itself thrust monopoly power upon the defendants, and they are not required to do the impossible in accepting indiscriminately all who would apply. Reasonable criteria of selection, therefore, such as lack of available space, financial unsoundness, or possibly low business or ethical standards, would not violate the standards of the Sherman Antitrust Act. But the latent monopolist must justify the exclusion of a competitor from a market which he controls. . . . The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable

> business requirements, establishes a prima facie case of the purpose to monopolize."

In *American Federation of Tobacco Growers, supra,* the Danville Tobacco Association, consisting of warehousemen and buyers of tobacco in Danville, Virginia, controlled the buying and selling of tobacco in this market, including the allotment of selling time at auctions. Plaintiff, a tobacco farmers' cooperative, built a warehouse just outside the city limits and applied for membership in the Association and for an allotment of selling time. The Association refused its application because it was located outside the city. The court held this to be an insufficient reason and reversed a summary judgment for the defendants stating at p. 871 of 183 F.2d:

> "There can be no question but that, by their control of the allotment of selling time, defendants had it within their power to exclude plaintiff from the Danville market or that plaintiff was excluded therefrom and eliminated as a competitor as a result of their exercising the power."

Defendants here too contended their conduct was not unreasonable because the plaintiff Coop could conduct sales in its own warehouses just as PGA contends Deesen can apply for membership in PGA after teaching golf and selling golf equipment at a country club for five years. The Court stated that the defendants having set up a monopoly could not justify their conduct by saying that other alternatives were available to the plaintiff, at p. 872 of 183 F.2d:

"Under the system of market control which defendants have built up, allotment of selling time is a prerequisite to doing business in the market; and, having set up the market in this way, defendants may not be heard to say that they have not established a monopoly merely because they do not interfere with an outside warehouse if it can shift for itself. It was just this sort of manipulation, involving the control of markets and the stifling of competition, that the Sherman Act was intended to prevent."

III

RESPONDENTS' ASSERTED DEFENSES DO NOT JUSTIFY THE RESTRAINTS IMPOSED.

The Antitrust Laws are intended to foster and preserve competition, and any restraint imposed must be justified on the ground it tends to foster and preserve competition, but if it cannot be so justified it is unreasonable and unlawful.

(1) The fact that membership in PGA is open to all persons is no justification for excluding non-members from playing in professional golf tournaments.

This asserted justification assumes that teaching golf and selling golf equipment to those desiring to learn and play the game, and competing for prizes in professional golf tournaments with other players who already know the game are one and the same business. On the contrary, the two are separate and

distinct. Generally, although there may be exceptions, those who teach and sell golf equipment don't play on the tour, and those who play on the tour don't teach and sell golf equipment.

Both the District Court and the Court of Appeals assume that any qualified tournament golf professional, if he is not selected as an Approved Tournament Player, should be both willing and able to spend five years teaching golf and selling golf equipment at a country club. Petitioner submits this assumption is contrary to reason and experience. Many persons, including petitioner herein, do not have either the ability or the desire to teach golf or sell golf equipment. Under PGA rules, assuming they are not successful in attaining an Approved Tournament Player status, these persons are automatically excluded from participation in PGA tournaments. Petitioner submits it is not reasonable to require a person to teach others a business or profession or to sell products in connection therewith as a condition to engaging in it to earn a living.

(2) The fact that the purpose of the rules was to eliminate an evil is not a sufficient justification.

Respondents have asserted in defense that because of the popularity of PGA tournaments some way had to be found to limit the number of participants. Petitioner concedes there was, and is, a necessity to limit the number of participants in these tournaments, but contends whatever rules are adopted toward this end

should apply equally to members and non-members alike, unless there is no alternative.[4]

Fashion Originators' Guild v. F.T.C., 312 U.S. 457;

Washington State Bowling Proprietors Association v. Pacific Lanes, Inc., supra.

In the *Washington State Bowling Proprietors Association* case referred to on page 11 above, rules of an association of bowling establishments (proprietors) limited participation in organized bowling tournaments only to those patronizing member establishments. The defendants attempted to justify the discriminatory rules on the ground that they were designed to prevent "cheating" or "sand-bagging" and other abuses. In rejecting this defense the Court stated:

> "Even assuming that abuses in the sport existed, it has been established since the case of *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941) that such circumstances do not justify a private association passing regulations to deal with the problem when their effect is to restrain or regulate interstate commerce."

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[4]The District Court never considered alternative ways in which participants in its tournaments might be limited although there was ample evidence in the record of such alternatives including resort to a player's handicap or record as is done in the Pro-Am tournaments, and to a greater use of pre-qualifying rounds as is done in the U.S. Open, Los Angeles Open and in other tournaments. (Reporter's Transcript, Trial Proceedings, pp. 147, 214.)

(3) The fact that PGA may have promoted professional golf tournaments is no justification for permitting it to exclude non-members from participation therein.

This asserted justification would appear to be as equally untenable as the first two set forth above. Why should a promoter of a new product or game be given any special privileges or rewards merely because he was the promoter? We are not dealing here with the inventor who is given a legal monopoly of his invention under the patent laws. PGA and its members didn't invent golf; they didn't even invent professional golf tournaments. They have been instrumental in promoting professional golf tournaments, but this alone is surely no justification for giving their members the right to exclude non-members therefrom.

CONCLUSION

PGA's rules concerning eligibility to participate in its tournaments were designed and have had the effect of "limiting the field" to PGA members and Approved Tournament Players selected by them. The indefiniteness of the Rules and the sole discretion vested in the committees selecting these approved tournament players give PGA the power to exclude any person no matter how well qualified and for any reason whatsoever. PGA has used these rules in the past to exclude persons because of their race. (Reporter's Transcript, Closing Arguments, p. 28.) In September 1958 they excluded 57 non-members, but not any of their own members. If their true purpose

is to limit the number of persons participating in PGA tournaments, they should be applied in a non-discriminatory manner to members and non-members alike!

For the foregoing reasons petitioner respectfully submits the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June 22, 1966.

Respectfully submitted,
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(Appendices Follow)

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

Herbert C. Deesen, Appellant, vs. The Professional Golfers' Association of America, an unincorporated association, et al., Appellees.	No. 19,837

[February 23, 1966]

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: Chambers, Hamley and Ely, Circuit Judges

Hamley, Circuit Judge:

Herbert C. Deesen brought this action against The Professional Golfers' Association of America (PGA) and a number of individuals to recover damages and obtain injunctive relief for alleged violations of sections 1 and 2 of the Sherman Act.[1] Damages were claimed in the sum of $70,000, trebled to $210,000.

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1964).

Jurisdiction in the district court was asserted under sections 4 and 16 of the Clayton Act.[2]

In his complaint, as modified by the pretrial orders, Deesen, who is a professional golfer, claimed that PGA and its members have combined and conspired to monopolize the business of tournament golf professionals in violation of section 2 of the Sherman Act. He also claimed that, as evidenced by PGA's rules and regulations governing the eligibility of entrants into PGA sponsored and co-sponsored tournaments, defendants have combined and conspired to restrain, unreasonably, the business of tournament golf professionals, and to boycott plaintiff, in violation of section 1 of the Sherman Act.

After a trial without a jury, judgment was entered for defendants. Plaintiff appeals. In the following paragraphs we summarize the findings of fact entered by the trial court, amplified to include certain undisputed facts stated in the second pretrial order but not carried forward into the findings of fact.

PGA is an association of some 4,300 golfers, founded in 1916 as a voluntary unincorporated nonprofit association. The named individual defendants are persons who were, at the time the complaint was filed on April 23, 1959, officers and employees of PGA and members of its tournament committee.

PGA sponsors or co-sponsors substantially all of the professional golf tournaments held in the United States. In order to compete in these golf tournaments,

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[2] 38 Stat. 731, 737 (1914), 15 U.S.C. §§ 15, 26 (1964).

a player must either be a member of PGA, or an approved tournament player, or one of a limited number of participants who may be designated or invited by the local sponsor. Because of the increasing popularity of professional tournament golf, the increasing number of golfers, and the increasing number of persons eligible to enter PGA sponsored tournaments, and because the limitations of time and space make it impossible to play a full tournament with a field of more than 150 or 160 golfers, some means had to be found to limit the number of golfers who could enter these tournaments. PGA rules limiting entry to PGA members, approved tournament players and a few others, and defining the qualifications necessary for non-member entrants, were intended to accomplish this purpose.

In order to become a PGA member a person must have five years experience, either in the employ of a golf club as a professional or in the employ of a professional, as an assistant at a golf club, or (in recent years) as a tournament player under an agreement with PGA, playing a minimum of twenty-five tournaments per year, or any combination of these methods for a period of five years. Deesen was at all times, and now is, unwilling to become employed by a golf club as a professional or as an assistant to a professional at a golf club.

An approved tournament player must be approved first by a local committee of PGA, then by PGA's tournament and executive committees. Approval is given if the applicant has, in the opinion of each of

these committees: (1) the ability to play golf and finish in the money in tournaments in which he competes, (2) the financial responsibility to undertake the golf tours, and (3) moral character and integrity. There are no issues herein as to Deesen's financial responsibility or his character and integrity.

There are no exact or definite standards set up to determine ability to play. The nature of golf is such that no precise standard of ability can be established other than by comparison of scores and ability to finish in the money in tournaments. In order to enter PGA sponsored and co-sponsored tournaments, PGA members are not required to meet the standards set for PGA-approved tournament players.

Deesen is a professional golfer who was eligible to compete as a PGA-approved tournament player in PGA sponsored and co-sponsored tournaments under contract with PGA from 1952 to 1958.[3] Pursuant to PGA rules and regulations and the tournament player's agreement that Deesen signed, he was required to compete in a minimum of fifteen PGA sponsored tournaments each year and maintain an ability to finish in the money in such tournaments. The requirement of competing in fifteen tournaments a year was later reduced to ten. During this period Deesen was active as a professional golf tournament

[3]One need not be employed by a golf club in order to be a professional golfer. Additional sources of income of professional golfers are winnings from tournaments, from personal appearances on television, radio and moving pictures, and from the endorsement of golfing equipment and other merchandise.

player, and he placed in the money three times, earning $240.35. Some of his scores were better than some of the PGA members' scores playing in the same tournaments. Deesen's record in PGA tournaments from 1952 through 1958 is shown in the margin.[4]

During this time he was otherwise unemployed. However, during part of this period he had a partnership arrangement with his parents to support him while he was thus engaged as a professional golfer. His expenses during the period from 1952 to 1958, were approximately $13,500. In 1958, Deesen sustained an injury which affected his playing ability and prevented him from competing in ten tournaments that year. PGA's tournament field supervisor was informed of this injury prior to September 1, 1958.

PGA sponsors from forty to fifty professional golf tournaments each year, scheduled throughout the nation so as to provide a national tour for golf professionals. The nucleus of the "field" in these tournaments is composed of PGA members and approved tournament players who earn their livelihood by fol-

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[4]

Year	Number of Tournaments Entered	Number of Tournaments in Which Qualified	Average Scores	Money Winnings
1952	0	0	—	0
1953	5	2	76.5 –78	0
1954	9	5	76 –85	$130.00
1955	3	1	79 –79.5	0
1956	10	4	79.75–82	$110.35
1957	10	0	77 –82	0
1958	4	0	76.5 –86	0

lowing the tournament circuit. At the present time, over two hundred golfers follow the circuit regularly.

In 1958, PGA's national tournament committee undertook to terminate the approved tournament player status of a number of professional golfers. The committee designated Harvey Raynor, J. Edwin Carter, and Lou Strong, PGA members and employees, to select the players whose contracts were to be terminated. As a result of their recommendations PGA terminated the contracts of fifty-seven professional golfers, including Deesen. His status as an approved tournament player was terminated by PGA on September 1, 1958. This was done on the grounds that his playing ability was not sufficient in the opinion of the PGA tournament committee, and for failure to compete in the requisite number of tournaments.

Prior to the commencement of this action, but after termination of his status as an approved tournament player, Deesen on a number of occasions applied to PGA and its tournament committee for reinstatement. During this period, plaintiff did not compete in professional tournament golf or play on courses altered for professional tournaments play. During this same period, Deesen's scores were sometimes around par, sometimes in the seventies and were in some instances between par and seventy-five.

After this action was commenced, Deesen again applied to PGA for reinstatement. Pursuant to an agreement reached between the parties at the first pretrial conference in this case, Deesen played a number of "test" rounds of golf with various professionals in

the San Francisco Bay Area. His scores on these rounds ranged from seventy-five to eighty-four and averaged over seventy-eight. On this showing, reinstatement was denied.

On January 14, 1959, Deesen appeared before PGA's national tournament committee, presented evidence of his prior injuries and his playing ability at that time and requested reinstatement. Reinstatement was denied.

On the basis of these facts, the trial court further found as follows: Deesen has not shown that the PGA rules were applied to him in a manner different in any way from that in which they were applied to any other approved tournament player or non-member of PGA. The fact that members are entitled to play in PGA sponsored and co-sponsored tournaments without the qualifications required of non-PGA members is not an improper discrimination since membership in PGA is open to all persons on the same conditions.

The district court also found: Deesen has failed to prove the existence of any agreement, combination, or conspiracy entered into for the specific purpose of keeping him personally out of PGA tournaments or for preventing him from making a living as a professional golfer. The evidence shows that admission to the status of an approved tournament player is and has always been open to all persons on the same terms. PGA has not excluded Deesen and other non-PGA members from tournament golf play in an arbitrary and unreasonable manner. The evidence does not establish that Deesen possessed such ability as a golfer that it is unreasonable to bar him from entering

PGA tournaments. Deesen has suffered no financial loss as a result of not having been permitted to play in PGA sponsored or co-sponsored tournaments.

On these findings, the trial court concluded that Deesen had not established any violation of sections 1 or 2 of the Sherman Act.

Deesen first argues that the trial court erred in not carrying forward into its findings of fact certain undisputed facts, favorable to Deesen, stated in the second pretrial order. We have included these omitted recitals in the above résumé of the findings of fact. If the findings are so amplified, support the conclusions of law, then the failure to include these undisputed facts in the formal findings was not prejudicial error.

Deesen next contends that the trial court erred in denying his motion to amend the findings of fact and to make additional findings.

We have examined the proposed amendments and additions to the findings. Some of them are, in effect, already incorporated in the formal findings or in the additions thereto which we have inserted in the above résumé. Others appear to be broader than the testimony relied upon would warrant, or they are concerned with details of the evidence which need not be reflected in the findings. We find no error in regard to these matters.

Deesen argues, in effect, that under the established facts it must be held that PGA's rules and regulations concerning eligibility to participate in PGA sponsored

tournaments are unreasonable restraints in violation of section 1 of the Sherman Act.

In support of this position appellant first contends that PGA rules and regulations are so indefinite as to be incapable of non-discriminatory enforcement and are thus unreasonable. Deesen attacks the method of processing applications for standing as an approved PGA tournament player. Pointing to the fact that such applications must receive the approval of a local PGA section, the sectional executive committee and the national tournament committee, Deesen argues that the standards applied are inadequate and are in any event subject to being disregarded in favor of personal bias.

Such applications must first be approved by the local section of PGA, where the applicant resides.[5] A local section consists of several members selected to handle such administrative affairs. Each applicant is interviewed by the local section; such matters as character and general reputation are considered.[6] The

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[5]The application must be signed by two class "A" members of the local section.

[6]Under PGA rules, each applicant must furnish evidence that he has sufficient ability to finish in the money in tournaments in which he competes, his lowest reported scores and the courses at which they were made, his average score, his reasons for wishing to enter into a tournament player's agreement, and letters in the nature of references which certify to his past achievements. He must also furnish evidence that he has insurance which covers him for personal legal liability which may arise out of or be occasioned by accidents involving him which may occur in the course of a tournament in minimum amounts of $100,000 for each person and $300,000 for each accident, together with assurance of his financial ability to support himself while participating in PGA tournaments.

local section also requires each applicant to play two test rounds with members of the section. There is no requirement that the applicant make a certain score, and the test rounds of themselves are not conclusive. General playing ability and ability to play in a way which will enable the player to maintain himself while on the tour, are considered.

Deesen argues that the personal dislike of just one member of a local section could result in denial of an application. However, no evidence has been called to our attention indicating that an individual member can control the action of a local section, or that applications are ever denied because of personal dislike unassociated with the standards referred to above.

In general the same standards are applied by the sectional executive committee and the national tournament committee, based on the results of the local section's inquiry and test rounds. Deesen argues, in effect, that these latter committees have uncontrolled discretion to deny applications for personal reasons entirely disassociated from the indicated standards. But, again, appellant does not call attention to any evidence which the trial court was required to accept, indicating that these top committees have discriminated against applicants on such a basis. It is true that Deesen testified, in effect, that he had been discriminated against in connection with his applications for reinstatement, but the trial court was not required to accept his apprisal of PGA's motivation.

The basic purpose of PGA in requiring persons who seek approved tournament standing to meet cer-

tain standards and obtain committee approval appears to be a reasonable one, insofar as the evidence before us indicates. That purpose is to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition.

The means PGA has chosen to accomplish this purpose also appear to be reasonable insofar as this record reveals, having in view the national scope of the activity and the practical problems which had to be met. The trial court did not err in holding that, in these respects, Deesen did not establish a violation of section 1 of the Sherman Act.

Deesen also attacks the PGA tournament entry rules on the additional ground that they are not applied uniformly to members and non-members, asserting that the rules are therefore unreasonable on their face. Appellant's specific grievance here is that a PGA member may play in any PGA tournament regardless of his average score, or his ability to finance himself, or the number of tournaments entered, or his ability to finish in the money regularly. Non-PGA members, on the other hand, may not play unless they obtain standing as PGA tournament approved players in accordance with the standards outlined above.

PGA's tournament program was originated in the 1930's for the primary purpose of promoting public interest in golf and of giving PGA members an opportunity to improve their skills through active com-

petition. PGA felt, and the record does not negate this, that the welfare of club professionals has a direct relationship to the extent of public interest and participation in the game.

It was soon determined that non-member professionals who had the ability to make a good showing in tournament play should also be permitted to engage in PGA sponsored tournaments. But this was not intended to undermine the initial purpose of giving PGA members this tournament outlet. The problem was solved by permitting anyone to join PGA on equal terms with every other member, and by setting up special requirements for non-PGA members who wished to participate in tournament play.

In *Chicago Board of Trade v. United States,* 246 U.S. 231, 238, the Supreme Court said:

> "The true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Measured by the test spelled out in *Chicago Board of Trade v. United States,* the indicated differentiation between PGA and non-PGA members with re-

gard to the right to participate in sponsored tournaments was not, on this record, shown to be for the purpose of suppressing or destroying competition, nor did it have that effect. The trial court did not err in so ruling.

Deesen contends that the trial court erred in failing to hold that PGA and its members have monopolized the business of tournament golf professionals in violation of section 2 of the Sherman Act.

Appellant premises this argument on three assertions of fact: (1) PGA sponsors and co-sponsors substantially all professional golf tournaments in the United States;[7] (2) to compete in these tournaments a player must either be a member of PGA or a PGA approved tournament player;[8] and (3) PGA has the power to exclude any applicant for participation in these tournaments for any reason whatsoever. Appellant states that, in view of these asserted facts, appellees have monopolized the businesss of tournament golf professionals in violation of section 2 of the Sherman Act.

The last of these assertions of fact is critical to Deesen's argument, but as worded, it is inconclusive. It is true that generally speaking, any association that undertakes to sponsor a contest of any kind has power to exclude any applicant from participation

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[7]PGA does not sponsor the U.S. Open Championship, Western Open Championship, Masters Tournament, and two or three other major tournaments.

[8]Local sponsors are also permitted to designate a limited number of participants.

for any reason whatsoever, unless such power is curtailed by operation of law. The pertinent inquiry, however, is whether an association intends to use that power in a manner which tends to suppress or destroy competition.

Mere size, unaccompanied by unlawful intent or conduct in the exercise of the power gained through size, does not constitute a violation of section 2 of the Sherman Act. *United States v. Swift & Co.*, 286 U.S. 106, 116. It is the existence of monopoly power coupled with the intent to use it for anticompetitive purposes or with inevitable anticompetitive effects that establishes the offense of monopolization. *United States v. Griffith*, 334 U.S. 100, 107.

No finding nor evidence has been called to our attention which indicates that PGA has used, or intends to use, its position as the sponsor or co-sponsor of a substantial number of tournaments to preclude sponsorship of tournaments by others, to exclude golfers from access to PGA sponsored tournaments, or to suppress or eliminate competition in professional tournament golf.

According to the evidence before us, PGA's creation of the category of approved tournament player tends to promote competition by facilitating participation by proficient younger players. According to the evidence, PGA has also sought to stimulate competition by giving official recognition to many tournaments which it neither sponsors nor co-sponsors. These "approved tournaments" are free from any PGA control, yet PGA plans its schedule around

them and counts them in determining its official standings.

Speaking only with regard to the evidence of record in this case, we hold that the trial court did not err in finding and concluding that PGA did not use its power in a way which is violative of section 2 of the Sherman Act.

Finally, Deesen argues that PGA and its members have combined and conspired to monopolize the business of tournament golf professionals and to boycott and exclude Deesen therefrom in violation of sections 1 and 2 of the Sherman Act.

Under this heading, appellant shifts his attack from the charge of actual monopolization, boycott and restraint to an accusation that PGA has at least combined and conspired to accomplish those results.

Granting that not only actual monopolization and restraint is condemned by the Sherman Act, but also combinations and conspiracies intended to bring about those results, the established facts of this case support one charge no more than the other.

With particular reference to the boycott charge, Deesen's tournament record over a period of several years provided an ample basis for the striking of his name from the list of approved tournament players. Similarly, his showing made during the test rounds arranged after this action was commenced warranted PGA in denying reinstatement to that list. Deesen could still engage in such tournaments if he chose to become a golf teacher employed by a golf club.

PGA is entitled to adopt reasonable measures for holding the tournaments to a manageable number.[9] It was required to treat Deesen as well as it treated others in the same category but it was not compelled to give him special treatment merely because he did not wish to accept PGA tournament entry rules and regulations.

The district court did not err in holding on the established facts of this case, that appellees did not conspire and combine to monopolize, boycott and restrain business in violation of sections 1 and 2 of the Sherman Act.

In view of our conclusions, as stated above, it is unnecessary to consider the arguments of the parties directed to the question of monetary damages and injunctive relief.

Affirmed.

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[9]At the present time approximately 230 professional golfers follow the tour and regularly enter PGA tournaments. Some seventy of these are PGA members, and the remaining 160 are approved tournament players. Pre-qualifying is generally necessary when there are more than 150 entrants in the tournament. The basic reason for this restriction to 150 tournament players is that only a limited number of golfers can play an eighteen-hole course under tournament conditions during the daylight hours of a single day.

Appendix "B"

United States Court of Appeals
for the Ninth Circuit

Herbert C. Deesen, Appellant, vs. The Professional Golfers' Association of America, an unincorporated association, et al., Appellees.	No. 19,837

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 23, 1966.

Appendix "C"

(Partial reporter's transcript of proceedings before Hon. Lloyd H. Burke on 12/23/63 in No. 38199, Deesen v. P.G.A., at San Francisco, California.)

* * * The Court: It is my opinion that the defendant, the Professional Golfers Association, has not excluded non-P.G.A. members from tournament golf play in an arbitrary or unreasonable manner. Absent P.G.A. rules designed to limit entry of non-members in tournament golf, the activity would not survive. The rules applicable to non-members are not on their face unreasonable and there has been no showing in this case that plaintiff has received treatment which differs in any way from that received by all other non-P.G.A. members. Plaintiff's contention, that the right of P.G.A. members to play in tournaments without qualification is obvious evidence of discrimination, must be rejected. Membership in the P.G.A. is open to all persons, including the plaintiff, on the same conditions. The members of the P.G.A. made tournament golf possible and their unique position in relation to the game warrants consideration not given to non-members.

If plaintiff wishes to avoid the effort required for P.G.A. membership, he cannot complain as long as the alternative requirements are applied without discrimination. The evidence does not establish playing ability on the part of the plaintiff at this time which would warrant the conclusion that he should be allowed to enter the tournaments in question or that

he has suffered financial loss by reason of his inability to play professional golf. On the contrary, the record requires a finding that plaintiff would have suffered substantial loss if he had been allowed to use the game as a means of livelihood.

The evidence shows no violation of the antitrust laws, and judgment is for the defendants. The defendants will prepare proposed findings of fact and conclusions of law pursuant to the rule.